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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

ROBERT A. URCIUOLI,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether, under circumstances where state law permits state legislators to hold outside employment and, under certain defined circumstances, to vote on legislation or take other official action which affects the interests of their employers, compliance with the requirements of state law provides affirmative protection against prosecution and conviction for federal honest services fraud.

II. Whether Urciuoli had constitutionally adequate notice either through 18 U.S.C. §1346 or "the bribe-and-kickback core of the pre-*McNally* case law," *Skilling v. United States*, ___ U.S. ___, 130 S.Ct. 2896, 2931 (2010), that acting in conformity with state law regulating the conduct of legislators employed by private parties could nonetheless subject him to prosecution for federal honest services fraud.

III. Whether, under such circumstances, juries must be instructed regarding the relevant provisions of state law to define for the jury the parameters of the honest services owed by state legislators to the citizens they represent and to assist the jury in making the determination whether the defendant acted with the criminally culpable intent to commit bribery or instead intended to act in conformity with state law.

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The opinion of the First Circuit Court of Appeals is reported at 613 F.3d 11 (1st Cir. 2010). (A. 1a) The opinion of the First Circuit Court of Appeals in a prior appeal in this case is reported at 513 F.3d 290 (1st Cir. 2008). (A. 16a)

STATEMENT OF JURISDICTION

The judgment of the First Circuit was entered on July 20, 2010. (A. 38a) This Court has jurisdiction to review the judgment of the First Circuit on a writ of certiorari under 28 U.S.C. §1254(1).

THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment, United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment, United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising

> in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C. §1341:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom,

> any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. §1346:

> For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

STATEMENT OF THE CASE

On January 5, 2006, Robert Urciuoli, CEO of Roger Williams Medical Center ("RWMC") in Providence, Rhode Island, was charged with conspiracy and substantive honest services mail fraud offenses in violation of 18 U.S.C. §§1341, 1346 in connection with his having arranged for John Celona, a Rhode Island state senator, to be hired as a consultant by an assisted living facility partly owned by an RWMC subsidiary. At the first trial of this case, the government relied on both a *quid pro quo* bribery theory and a concealed conflict of interest theory of honest services fraud. Urciuoli contended that he had acted in conformity with Rhode Island state law which expressly allows the state's part-time legislators to continue to participate and vote with respect to legislative matters which affect their employers to the same extent as all other employers falling within the same general category and that he did not act with fraudulent intent but instead acted in the good faith belief that the consulting contract with Celona was lawful under state law. Urciuoli requested that the jury be instructed regarding the relevant provisions of state law, but the district court declined to do so.

On appeal to the First Circuit, Urciuoli contended that the district court had erred in refusing to instruct the jury regarding Rhode Island state law and its centrality to the determination of what constitutes federal honest services fraud, that the district court's instructions regarding honest services fraud were unduly expansive, and that certain of the conduct on which the government relied fell outside the bounds of §1346. The First Circuit vacated Urciuoli's convictions on other

grounds and did not decide the state law issues. It did, however, discuss the issue, as it was certain to arise on retrial. The Court stated:

> The relationship between state law and the federal honest services statute is unsettled. The Fifth Circuit has held that section 1346 extends only to conduct that independently violates state law. . . . Other circuits have denied that state law plays any necessary role. . . . It is plain that sections 1341 and 1346 enact a federal crime – but beyond that, broad generalizations may be unsafe.
>
> Conceivably in some circumstances, state law might bear on what "services" are owed by a state legislator. But how far state law might be a premise for honest services fraud . . . *or, alternatively, might "immunize" conduct that could otherwise be a federal crime*, are tricky questions and may depend *inter alia* on precisely what the government has charged. The issue could be pertinent here *if* the government in this case had chosen to proceed on the theory that a conflict of interest alone (as opposed to a bribe or concealment of a conflict) was a basis for conviction.

(A. 32a-33a) (first emphasis added; second emphasis in original; citations and footnote omitted).

On retrial, the government, without doubt to avoid having the jury instructed with regard to the Rhode Island class exception and its central role in

the jury's determination whether Urciuoli had in fact committed federal honest services fraud, this time labeled its prosecution a *quid pro quo* bribery case. Urciuoli maintained, as he had from the outset, that he did not possess the criminal intent to defraud required for violations of §§1341, 1346 and that, in bringing about the consulting contract between Celona and the assisted living facility and in his dealings with Celona, he relied on the advice of counsel and on his knowledge of the Rhode Island class exception which permitted Celona to participate fully in legislative activities concerning general healthcare issues while being employed by an RWMC affiliate. To ensure that the jury could properly evaluate his defenses, Urciuoli requested that the jury be instructed with respect to the Rhode Island part-time legislator system and the provisions of the "class exception," contending that state law played a substantive role in defining the right of citizens of Rhode Island to the honest services of their legislators and that such instructions were critical to the jury's ability to fairly evaluate his intent.

With specific respect to the Rhode Island "class exception", Urciuoli requested that the jury be instructed as follows:

> Under certain circumstances, legislators can participate in legislation even though that legislation could affect the interests of the private entity for whom the legislator works. Specifically, Rhode Island state law contains a provision known as the class exception.
>
> This provision expressly permits a legislator to take action that would

affect a private entity for whom the legislator works as long as the legislation would affect that entity to no greater extent than any other similarly situated entities.

This is referred to as the class exception because it applies when proposed legislation treats a class of entities, such as all teachers or hospitals, alike.[1]

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[1] This is the requested instruction on which the First Circuit focused its opinion. Urciuoli also requested that the jury be instructed that:

> [i]n deciding whether a scheme targets the honest services due from a part-time legislator, you must consider the requirements of Rhode Island law. . . . In assessing whether the government has proven a scheme intended to deprive the public of the honest services of John Celona, you must consider whether the activity contemplated by the scheme is activity which is allowed under state law. If it is, you must conclude that the government has not proven its case, and you should return a verdict of not guilty.
>
> On the other hand, if you conclude that a defendant intended to do something which is not allowed under state law, then you must go on to assess whether the government has proven all of the other elements of mail fraud.

In addition, Urciuoli requested that the jury be instructed:

> First, you must determine whether a defendant may have acted in good faith because he or she believed the activities were allowed by state law. If the defendant may have acted in good faith, then the government will have failed

The district court initially appeared inclined to give the requested instructions, noting that this case was not a typical honest services fraud case:

> This is not the typical case. This is a case where the so-called bribe is the giving of a job. We've got plenty of evidence in the case relating to how that employment relationship affects what [Celona] can and cannot do as a legislator, so I think this case does require some explanation of the distinction between the two.

Tr. 2/19/08 (R436) at 15. The district court also expressed its belief that, despite the government's

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> to prove beyond a reasonable doubt that the defendant acted willfully and with the specific intent to defraud the public, which are both required to establish honest services mail fraud.
>
> Second, you must determine whether the government has proven that the object of a defendant's activities was in fact to deprive the public of the honest services of John Celona. In deciding this issue, you should consider the requirements of state law as they help define the honest services which are expected of a Rhode Island legislator.

The First Circuit indicated that it found Urciuoli's argument that the district court erred in declining to give these instructions "seemingly forfeited," because "his opening brief did not directly address" them, but went on to dismiss them for the same reasons it rejected the specific "class exception" instruction. (A. 9a) In fact, the arguments contained in Urciuoli's opening brief encompassed all the requested state law instructions equally. In any event, the instruction request which the First Circuit regarded as fully preserved suffices to raise all the issues addressed herein.

limitation of its theory of prosecution to *quid pro quo* bribery, the case it had tried was really a concealed conflict case. *See id.* at 43 (court tells government that "[y]ou may try to shoehorn this into a quid pro quo type theory, but the facts of this case simply aren't that clear-cut"); *id.* at 44 ("this [is a] really strange sort of case. In all honesty, I think this is a concealed conflict case. . . .This isn't a quid pro quo case"); *id.* at 45 ("I think we are in a very gray area"). Ultimately, however, the district court declined to give the requested instructions. The jury returned a verdict of guilty on all counts.

On appeal to the First Circuit, Urciuoli renewed his contention that the requested instructions regarding state law were critical both in defining for the jury the honest services owed by Rhode Island state legislators to the citizens of Rhode Island and in providing the jury with essential guidance in determining the pivotal question of whether Urciuoli acted with the requisite intent to defraud. During the pendency of Urciuoli's appeal, this Court decided *Skilling v. United States*, ___ U.S. ___, 130 S.Ct. 2896 (2010), in which it sharply circumscribed the boundaries of §1346 to reduce the statute to its pre-*McNally*[2] essence: "to preserve the statute without transgressing constitutional limitations, we now hold that §1346 criminalizes *only* the bribe-and-kickback core of the pre-*McNally* case law." *Id.* at 2931 (emphasis in original). Urciuoli filed a supplemental brief, urging that *Skilling*'s limitation of §1346 to "the bribe-and-kickback core of the pre-*McNally* case law" rendered the giving of the requested instructions regarding Rhode Island law even more critical, both to define

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[2] *McNally v. United States*, 483 U.S. 350 (1987).

the duty of honest services of Rhode Island's part-time legislators to the citizens of the state and to permit the jury to intelligently assess Urciuoli's intent.

Skilling's limitation of §1346 to the core pre-*McNally* bribery/kickback caselaw, Urciuoli contended, intensifies the need for juries to be provided with carefully delineated instructions, such as those which he requested, regarding what constitutes the "honest services" owed by the public official at issue, to ensure that the case does not stray beyond pre-*McNally* boundaries and result in the conviction of a defendant who had acted in full conformity with state law. He further contended that, even if consulting payments made under the circumstances present in this case could, *arguendo*, be found to be embraced within the core pre-*McNally* bribery caselaw, he could not be convicted of either conspiracy or substantive honest services fraud unless he *intended* to commit, or *intentionally* entered into a conspiratorial agreement to commit, bribery *falling within the compass of pre*-McNally *caselaw*, which, if his intent was to act in conformity with what was permitted under state law, he did not.

The First Circuit rejected Urciuoli's contentions regarding the need for the requested state law instructions. The Court held that the requested instructions were not necessary to the presentation of Urciuoli's good faith defense and "could have misled the jury into thinking the class exception could excuse bribery." (A. 9a)

REASONS WHY THE WRIT SHOULD BE GRANTED

I.

Nothing in the long history of honest services fraud jurisprudence suggests that Congress intended, in enacting §1346, to override state law and extinguish the right of a state to define for itself the "honest services" owed by its legislators to its citizens. Interpreting §1346 to exclude state law considerations in defining the "intangible right" to "honest services" would superimpose upon the states a single generic ethical regime in violation of the basic principles of federalism. Such concerns underlay this Court's decision in *McNally v. United States*, 483 U.S. 350 (1987), refusing to "construe [§1341] in a manner that leaves its outer boundaries ambiguous and involves the federal government in setting standards of disclosure and good government for local and state officials." *Id.* at 360. *See Cleveland v. United States*, 531 U.S. 12, 27 (2000)("Absent clear statement by Congress, we will not read the mail fraud statute to place under federal superintendence a vast array of conduct traditionally policed by the States"); *see also United States v. Bass*, 404 U.S. 336, 339 (1971)("unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance").[3] Such concerns

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[3] The Third Circuit relied on such federalism concerns in *United States v. Panarella*, 277 F.3d 678, 694 (3d Cir.), *cert. denied*, 537 U.S. 819 (2002), in concluding that state law provided the best limiting principle for "defining federal honest services fraud in close cases." *Id.* at 693-94. The Fifth Circuit's decision in *United States v. Brumley*, 116 F.3d 728, 733 (5th Cir.)(*en banc*), *cert. denied*, 522 U.S. 1028 (1997), also relied on similar concerns:

are strongly implicated in cases such as this one, in which the regulation of the conduct of state legislators is a matter within the traditional competence of the states and in which Rhode Island has chosen to be governed by legislators who are permitted to participate in legislative matters of interest to their employers under certain defined circumstances.

The wisdom of Rhode Island's chosen system may well be questioned, and federal prosecutors may disapprove of the conflicts under which it expressly permits its part-time legislators to conduct their official acts and duties, but the fact remains that it provides normative standards against which Rhode Island citizens evaluate the propriety of their conduct with respect to their state legislators. It is a basic principle of our criminal justice system that "a criminal statute must give fair warning of the conduct that it makes a crime." *Bouie v. City of Columbia*, 378 U.S. 347, 350 (1964).[4] Neither the

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> We find nothing to suggest that Congress was attempting in §1346 to garner to the federal government the right to impose upon states a federal vision of appropriate services – to establish, in other words, an ethical regime for state employees. Such a taking of power would sorely tax separation of powers and erode our federalist structure.

Id. at 734.

[4] *See also Sorich v. United States*, 129 S.Ct. 1308, 1310 (2009)(Scalia, J., dissenting from denial of certiorari)("It is simply not fair to prosecute someone for a crime that has not been defined until the judicial decision that sends him to jail"); *Panarella*, 277 F.3d at 698 (noting that language in Court's prior honest services fraud opinions "do[es] little to allay fears that the federal fraud statutes give inadequate notice of

language of §1346 nor any judicial augmentation of it, either pre- or post-*McNally*, provided Urciuoli with clear notice, independent of his knowledge of state law, that he and RWMC were forbidden, at the peril of a federal criminal indictment, to employ Celona and to communicate their views to him.

Adding substantial weight to federalism and Fifth Amendment fair notice concerns are the critical First Amendment implications of regulating citizens' interactions with their elected representatives and thereby impacting their exercise of the fundamental right to "petition the Government for redress of grievance," a right protected by both the First Amendment and the Rhode Island Constitution, considerations which loom particularly large under circumstances where state law *allows* an employer to continue to "petition" its employee-legislator on matters affecting its interests.[5] There is an essential

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criminality and delegate to the judiciary impermissibly broad authority to delineate the contours of criminal liability"); *Brumley*, 116 F.3d at 745-46 (Jolly, J., dissenting)("The requirement imposed by the Supreme Court [in *McNally*] to speak more clearly was . . . for the benefit of the public, the average citizen, . . . who must be forewarned and given notice that certain conduct may subject him to federal prosecution").

[5] *See McCormick v. United States*, 500 U.S. 257 (1991)(Hobbs Act prosecution based on campaign contributions requires proof of explicit *quid pro quo*; "Whatever ethical considerations and appearances may indicate, to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, 'under color of official right'").

line to be drawn between employing a state legislator and continuing to address with him legislative matters of interest and bribing a state legislator with the corrupt intent to cause him to alter his official conduct in return, and state law has a crucial role to play in drawing that line.

II.

In *Skilling v. United States*, ___ U.S. ___, 130 S.Ct. 2896 (2010), the Court was confronted with a vagueness challenge to the constitutionality of 18 U.S.C. §1346, Congress' response to the Court's earlier opinion in *McNally v. United States*, 483 U.S. 350 (1987), which had eliminated deprivation of intangible rights, such as the right to honest services, from the reach of the federal mail and wire fraud statutes. Rather than invalidate the statute in its entirety, the Court sharply circumscribed its reach, limiting it to "*only* the bribe-and-kickback core of the pre-*McNally* case law." *Id.* at 2931 (emphasis in original). Cases falling within that "core" were those "involv[ing] fraudulent schemes to deprive another of honest services through bribes or kickbacks supplied by a third party who had not been deceived." *Id.* at 2928. *See id.* at 2930 ("The 'vast majority' of the honest-services cases involved offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes"); *id.* at 2933 ("honest services fraud does not encompass conduct more wide-ranging than the paradigmatic cases of bribes and kickbacks"). If "[c]onfined to these paramount applications," the Court concluded, §1346 presented no vagueness problems.

Skilling's limitation of §1346 to "the bribe-and-kickback core of the pre-*McNally* case law"

defines not just the general type of cases which may be prosecuted under §1346 but also what conduct may properly be labeled "bribery," *i.e.*, that which is encompassed within the pre-*McNally* bribery/kickback core. *See Skilling*, 130 S.Ct. at 2933 (§1346's "prohibition on bribes and kickbacks draws content . . . from the pre-*McNally* caselaw"). Post-*Skilling*, it is not enough to simply apply the label "bribery" to payments made by a private party to a state legislator; instead, such payments must fall within the parameters of pre-*McNally* bribery cases.

In the years between the enactment of §1346 and this Court's decision in *Skilling*, the federal courts struggled to articulate coherent limiting principles to cabin the exceedingly broad scope of §1346, the "28 words" of which had "been invoked to impose criminal penalties upon a staggeringly broad swath of behavior." *Sorich v. United States*, 129 S.Ct. 1308, 1309 (2009)(Scalia, J., dissenting from denial of certiorari). One limiting principle which courts explored is the role of state law in defining the scope of public-sector honest services fraud. In *United States v. Brumley*, 116 F.3d 728, 733 (5th Cir.)(*en banc*), *cert. denied*, 522 U.S. 1028 (1997), the Fifth Circuit held that state law defines the services which are owed by state employees: "the official must act or fail to act contrary to the requirements of his job under state law."[6] Other courts rejected state law as

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[6] Relatedly, the Third Circuit held in *Panarella*, 277 F.3d at 694, that "a public official who conceals a financial interest *in violation of state criminal law* while taking discretionary action that the official knows will directly benefit that interest commits honest services fraud" (emphasis added), but stopped short of holding that such a violation was *necessary* for a concealed conflict of interest to amount to honest services fraud. *Id.* at 699 n.9.

a limiting principle, for example, the Ninth Circuit in *United States v. Weyhrauch*, 548 F.3d 1237, 1245 & n.5 (9th Cir. 2008)(holding that government is not required to prove an independent violation of state law to sustain honest services fraud conviction, but expressly leaving open question of "what effect, if any, state law that expressly condones or excuses certain conduct would have"). This Court granted certiorari in *Weyhrauch* on the question "[w]hether, to convict a state official for depriving the public of its right to the defendant's honest services through the non-disclosure of material information . . . the government must prove that the defendant violated a disclosure duty imposed by state law." *Weyhrauch v. United States*, ___ U.S. ___, 129 S.Ct. 2863 (2009). The Court did not ultimately decide that question but instead remanded the case for further consideration in light of *Skilling*. *Weyhrauch v. United States*, ___ U.S. ___, 130 S.Ct. 2971 (2010).

This case presents to the Court related issues which are in some ways the other side of the *Weyhrauch* coin: the role of state law in defining what may and may not properly be prosecuted as federal honest services fraud, when a defendant's conformity with state law may preclude prosecution for federal honest services fraud, and the circumstances under which a defendant is entitled to have the jury instructed regarding provisions of state law which bear upon both the substantive "honest services" owed to the citizens of a state by its legislators and the jury's rational assessment of the defendant's intent. State law has a critical role to play in ensuring that §1346 remains cabined within the bounds set in *Skilling*, *i.e.*, in ensuring that prosecutions under the statute do not stray beyond

the parameters of the pre-*McNally* bribery/kickback core.

III.

The first critical function served by state law is in defining the scope of the honest services owed by the public official to the citizenry he or she serves. It is no answer to say, as the First Circuit did, that state law does not condone bribery. (*See* A. 7a) Of course it does not. It can, however, provide important guidance for the jury in its consideration whether the conduct which the government has labeled "bribery" was in fact criminally culpable pre-*McNally* bribery which may be punished federally under §1346.

Rhode Island has chosen a citizen-legislator system of governance in which its legislators devote only part-time to their legislative duties and of necessity generally hold outside employment, for which they are paid by their employers.[7] To address

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[7] Seventeen states have part-time legislatures in which state legislators devote only about half their time to their legislative duties and receive compensation which "is quite low and requires them to have other sources of income in order to make a living": Georgia, Idaho, Indiana, Kansas, Maine, Mississippi, Montana, Nevada, New Hampshire, New Mexico, North Dakota, Rhode Island, South Dakota, Utah, Vermont, West Virginia, and Wyoming. National Conference of State Legislatures, *Full and Part-Time Legislatures* (June, 2009), available at www.ncsl.org/?tabid=16701, last visited September 27, 2010. An additional 23 states have legislatures in which state legislators devote roughly two-thirds of their time to their legislative duties and receive an income for their legislative work which is "usually not enough to allow them to make a living without having other sources of income": Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Hawaii, Iowa, Kentucky, Louisiana, Maryland, Minnesota,

the potential conflicts of interest inherent in such a system and to guide its legislators and the citizens employing them, Rhode Island has by law defined the circumstances in which its legislators may and may not participate in or vote on legislation which will affect their employers and has made the decision that its legislators may participate in and vote on legislation which affects their employers if the impact which the legislation would have on their employers is no greater than that which it would have on other employers in the same category ("the class exception"). R.I.G.L. §36-14-7(b).[8]

Missouri, Nebraska, North Carolina, Oklahoma, Oregon, South Carolina, Tennessee, Texas, Virginia, and Washington. *Id.*

[8] R.I.G.L. §36-14-7 provides:

> (a) A person subject to this code of ethics has an interest which is in substantial conflict with the proper discharge of his or her duties or employment in the public interest and of his or her responsibilities as prescribed in the laws of this state, if he or she has reason to believe or expect that he or she or any person within his or her family or any business associate, or any business by which the person is employed or which the person represents will derive a direct monetary gain or suffer a direct monetary loss, as the case may be, by reason of his or her official activity.
>
> (b) A person subject to this code of ethics does not have an interest which is in substantial conflict with the proper discharge of his or her duties in the public interest and of his or her responsibilities as prescribed by the laws of this state, if any benefit or detriment accrues to him or her or any person within his or her family or any business associate, or any business by which the person is employed or which the person represents, as a member of a business,

The Rhode Island system of governance, and the rules which it has chosen to govern the conduct of its legislators, form an indispensable part of how Rhode Island has chosen to define the "honest services" which a state legislator owes to the citizens of Rhode Island.[9] In some jurisdictions, a finding that the defendant had put a state legislator on the payroll would be tantamount to a finding of *quid pro quo* bribery, but not in Rhode Island and other states having comparable statutes. In Rhode Island, a legislator may accept a paycheck from his employer and proceed to advocate and vote in favor of legislation which will further the interests of the industry of which his employer is a part or, alternatively, seek to defeat legislation which will be

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> profession, occupation, or group, or of any significant and definable class of persons within the business, profession, occupation, or group, to no greater extent than any other similarly situated member of the business, profession, occupation, or group, or of the significant and definable class of persons within the business, profession, occupation or group.

[9] Some courts have indicated that state law may play a role in defining the duties owed by a fiduciary. *See, e.g., United States v. Segal*, 495 F.3d 826, 834-35 (7th Cir. 2007)("state laws are useful for defining the scope of fiduciary duties;" approving instruction which told jury that state law could be used to determine "the existence, the scope and the nature of the defendants' legal and fiduciary duties"), *cert. denied*, 553 U.S. 1006 (2008); *United States v. Murphy*, 323 F.3d 102 (3d Cir. 2003)(looking to both state and federal law for source of fiduciary duty); *United States v. McGeehan*, 584 F.3d 560 (3d Cir. 2009)(discussing *Murphy* and the role of state law); *see also United States v. Rezko*, 2007 WL 2904014 at *6 (N.D.Ill. October 2, 2007)(government contended that evidence of Illinois law was relevant "because [it] help[s] define the scope of [defendant's] duty of honest services under §1346").

uniformly detrimental to the category of employers to which his employer belongs, all without violating Rhode Island law so long as the required disclosures are filed.[10]

Because the combination of money paid to a legislator by an employer and legislative action by the employee-legislator which benefits his employer is not, in Rhode Island or other states with comparable statutes, *ipso facto quid pro quo* bribery, judicial guidance to the jury regarding how it is to draw the distinction between conduct which is permitted under state law – employment of a legislator who thereafter votes in favor of class-based legislation which will further the interests of his employer (or casts his vote against legislation which will harm those interests) – and conduct which is not – a quid pro quo exchange of money for the legislator's votes. Here, for example, Celona, the legislator whom Urciuoli was accused of bribing, could properly act with respect to any legislation which would have had an equal impact, for good or ill, on RWMC and other hospitals and health-care providers, and, critically, virtually all of the legislation with respect to which the government introduced evidence regarding Celona's actions fell into this general healthcare category. In cases such as this one, absent judicial guidance regarding the conduct permitted under state law, jurors are all too likely to believe that any time a legislator votes on a

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[10] Under Rhode Island law, it is the legislator, not the private party, who bears the responsibility for determining whether he has a conflict of interest and, if so, whether it requires him to recuse himself from participation with respect to the matter or simply to file a disclosure notice under R.I.G.L. §36-14-6.

matter that favorably affects the interests of his employer he violates his duty of honest services.

Under such circumstances, instructions regarding relevant state law are critical to counter the inevitable inference of wrongdoing which an uninformed jury would draw and to prevent the honest services fraud conviction of a defendant who has acted in full conformity with state law. An understanding of Rhode Island law and, particularly, the class exception, was essential to the jury's ability to distinguish between, on the one hand, lawful consulting payments paid to a state legislator by a private employer who continues to interact with the legislator on legislative matters, coupled with legislative action falling within the class exception, and, on the other hand, corrupt bribery for the purpose of influencing the legislator's official acts.

IV.

In cases such as this one, state law also has substantial bearing on whether the defendant/employer intended to cause the legislator/employee to deviate from the honest performance of his public duties and on whether the jury could rationally find that the payments made to the legislator were in fact intended as a bribe paid in exchange for favorable action by the legislator on legislation of interest to the employer or whether they were instead payments by an employer in intended conformity with state law. In this case, given the proof of Urciuoli's knowledge of the state law class exception and of his discussions with RWMC's counsel regarding what Celona could and could not permissibly do under state law, state law formed an integral component of Urciuoli's state of mind in his

hiring of Celona and his dealings with him thereafter. If, as state law provided a basis to do, Urciuoli believed that RWMC could employ Celona and that Celona could thereafter permissibly continue to vote on general healthcare matters that affected RWMC to the same degree as other healthcare providers and that, concomitantly, he could continue to interact with Celona with respect to RWMC's position on legislation, and conformed his conduct to the requirements of state law, then the jury could have found, had it had the necessary judicial guidance, that Urciuoli did not intend the consulting payments to Celona as a corrupt *quid pro quo* bribe in exchange for favorable legislative action.

In cases such as this one, which falls well outside the heartland of bribe-for-vote honest services fraud cases and for which there is no template to be found in the pre-*McNally* caselaw, it is essential that the jury be provided with the guidance it needs to be able to distinguish between acts which may appear to it unseemly and those which are in fact criminal under §1346, particularly where, as here, the jury is unlikely to be aware of the law which permits legislators to vote on matters affecting their employers and are, in fact, likely to assume without such guidance that such conduct is improper.[11]

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[11] The First Circuit, without discussing why such would be the case, concluded that the requested state law instructions could confuse the jury by suggesting that "the class exception could excuse bribery." (A. 9a) Such instructions would not, however, properly framed, have led to any such confusion. Instead, they would have told the jury that some conduct which jurors would likely intuitively regard as bribery may, in fact be consistent with an intent to act in conformity with state law,

Even if consulting payments made under the circumstances present in this case could arguably be found to be embraced within the core pre-*McNally* bribery caselaw, Urciuoli could not, in light of *Skilling*, be convicted of either conspiracy or substantive honest services fraud unless he *intended* to commit, or *intentionally* entered into a conspiratorial agreement to commit, bribery *falling within the compass of* pre-*McNally* caselaw. If his intent was to act in conformity with what was permitted under state law, he did not. The consulting payments to Celona may look like a form of bribery to those unfamiliar with the system of governance which Rhode Island has chosen, but whether they were bribery at all – and certainly whether they constituted "bribery" as reflected in pre-*McNally* caselaw – could not fairly be determined by the jury absent knowledge of what Rhode Island permitted its legislators to do in matters involving the interests of their employers, law on which private parties are entitled to rely in their dealings with state legislators.

A properly instructed jury could well have credited Urciuoli's defense that he did not intend to deprive the citizens of Rhode Island of Celona's honest services but instead to act in conformity with state law. The jury could, to be sure, have rejected the defense, but without the requested instructions, it could not, contrary to the conclusion of the First Circuit, *see* A. 8a-9a, even fairly consider it.[12] Absent

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leaving it for the jury to determine the intent with which Urciuoli acted.

[12] Absent instructions which told the jurors that they could consider Rhode Island law in assessing Urciuoli's intent and good faith, the jury was left without the *judicial* guidance necessary to fairly evaluate Urciuoli's defenses. *See United*

judicial guidance, the jury would have no idea how to evaluate the defense contentions or even whether they were permitted to consider such arguments at all in determining the critical issue of Urciuoli's intent.[13] The proffered instructions were a correct statement of state law essential to the jury's understanding of a principled theory of defense and amply warranted by the evidence in the case. Under the Due Process Clause of the Fifth Amendment, "a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Matthews v. United States*, 485 U.S. 58, 63 (1988). *See United States v. Gamache*, 156 F.3d 1, 9 (1st Cir. 1998)("[a] criminal defendant is entitled to an instruction on his theory of defense so long as the theory is a valid one and there is evidence in the record to support it"). In the absence of the requested instructions, the jury was left unequipped to fairly assess Urciuoli's theory of defense, and Urciuoli did not receive a fair trial.

States v. Prigmore, 243 F.3d 1, 20-21 (1st Cir. 2001). Jurors may have heard the evidence, the defense arguments, and general instructions regarding the elements of honest services fraud, but they were not instructed that they could consider state law in deciding whether Urciuoli acted with the requisite corrupt intent.

[13] *See, e.g., United States v. Lake*, 472 F.3d 1247, 1263 (10th Cir. 2007)("When a defendant's defense is so dependent on an understanding of an applicable law, the court has a duty to instruct the jury on that law, rather than requiring the jury to decide whether to believe a witness on the subject or one of the attorneys presenting closing argument").

CONCLUSION

For all the foregoing reasons, Urciuoli's petition for a writ of certiorari to review the decision of the First Circuit in this case should be granted.

Respectfully submitted,

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